U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34820718

Date: DEC. 5, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner is a real estate broker who seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the record did not establish that she received a major, internationally recognized award, nor did she demonstrate that she met at least three of the ten regulatory criteria. The Petitioner filed a subsequent motion to reopen and reconsider that the Director dismissed for not meeting the requirements of those motion types. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

We begin any appeal ensuring the filing party identifies an erroneous conclusion of law or statement of fact within the most recent decision in a previous proceeding. *See* 8 C.F.R. § 103.3(a)(1)(v), 103.3(a)(2)(i)–(iv). This applies to appeals of adverse conclusions on petitions and applications or appeals of adverse decisions on motions. Under that framework, we look to whether the Director met their responsibilities for that particular type of decision (e.g., petition denials or revocations versus motion dismissals). When it comes to motions, we evaluate the following:

1. For a motion to reopen at 8 C.F.R. § 103.5(a)(2) we consider whether the Petitioner stated new facts and supported those facts with documentary evidence; and
2. For a motion to reconsider at 8 C.F.R. § 103.5(a)(3) we consider whether the Petitioner established the Director's prior decision was based on an incorrect application of law or policy, and whether the decision was incorrect based on the evidence in the record of proceedings at the time of the decision.

As a result, we consider whether the Petitioner has demonstrated that the Director improperly dismissed the motion to reopen and reconsider. But here, the Petitioner's appeal brief contains the identical arguments she presented to the Director when she filed her combined motions, and she only amended the brief in some parts to reflect the case is procedurally now being appealed instead of motioned. In other words, she argues on appeal why she believes the Director's petition denial was incorrect instead of why the Director's motion dismissal was performed in error. So, her failure to address why the Director's motion dismissal contained any erroneous conclusion of law or statement of fact is a singularly sufficient basis to dismiss her appeal.

But, even considering a portion of the underlying petition denial, the Petitioner initially claimed she commanded a high salary or other significantly high remuneration for services, in relation to others in the field under the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The Petitioner asserted she earned a high salary or a significantly high remuneration based on the earnings of her real estate brokerage company consisting of the company earnings and what she presents as its commissions from 2022. Subsequently, the Petitioner claimed the company's earnings and commissions as comparable evidence.

When the Director denied the petition, they noted among other shortcomings, that the Petitioner did not provide evidence of the salary or remuneration that the Beneficiary actually received. In particular, the Director discussed the letter from the Petitioner's accountant and two pages of a business tax return. The Director noted a lack of evidence to corroborate the accountant's claims that all the company's earnings were essentially the Petitioner's earnings. The Director also raised the issue that even though the partial tax return reflected compensation for the organization's officers' and salaries and wages, the material as a whole left it unclear what amount the company paid to the Petitioner or what amount remained that she could claim under the salary or remuneration criterion.

And because the Petitioner had directly claimed the salary or remuneration criterion, the Director did not offer analysis of her comparable evidence claims as foreign nationals may only properly claim comparable evidence "if it is determined that the evidentiary criteria described in the regulations do not readily apply to the person's occupation." *See generally* 6 *USCIS Policy Manual* F.2(B)(1), https://www.uscis.gov/policymanual. Further, USCIS policy provides that "[a] general unsupported assertion that the listed evidentiary criterion does not readily apply to the petitioner's occupation is not probative." *Id.* Stated differently, the filing party must demonstrate that the criterion is not readily applicable to their occupation and general statements or claims are not sufficient to allow them to claim comparable evidence.

But simply claiming the company's earnings as the Beneficiary's own is problematic, as those are earnings for the organization, and her appeal does not address the Director's conclusions. Although the motion brief—and the nearly identical appeal brief—address the company's total income, the tax returns reflect deductions from total income reducing the amount by 87 percent. We observe the Petitioner's claims and some evidence in the record characterizes the company's total income as commissions.

Yet, the partial tax returns are not in agreement with that characterization. Instead, the partial tax returns reflect that amount is the organization's gross receipts or sales rather than a form of income

earned from business transactions. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1988). The Petitioner has not presented a persuasive argument why the company's sales without adjusting for the expenses of generating those sales (i.e., gross sales) should be the amount we consider as her salary or remuneration.

On the partial tax returns, subtracting the deductions from the gross receipts or sales would result in the remaining amount of $132,524 as the high salary or significantly high remuneration the Petitioner could claim under the relative criterion.[1] As evidence in which to compare this amount under the salary criterion, the Petitioner offered data from the Bureau of Labor Statistics and other resources mostly demonstrating what the average or mean salary was for real estate brokers across the United States or by state. She also offered more granular data for real estate brokers in different parts of Florida, where she operates the business.

But some of the data in that evidence was in conflict. For example, an article from Zip Recruiter reflected the average pay in Florida was $80,917 while those working in the [redacted] area earn approximately 11 percent more than that amount, but the evidence from Indeed only reflected the average salary for a real estate broker in [redacted] of $78,367. The Petitioner did not explain why she offered evidence from one source reflecting an average salary for a higher paying area that was well below the average salary for the entire state contained within other evidence. The Petitioner must remedy this discordant information in the record. Such a correction must be demonstrated through the submission of relevant, independent, and objective evidence that reveals which facts are accurate. *See Ho*, 19 I&N Dec. at 591–92.

That brings us to our final point the Director raised in their request for evidence and in the petition denial. The Director informed the Petitioner she did not provide evidence showing what other similarly positioned real estate brokers who were business owners were commanding as a salary or remuneration (versus those who work under another broker such as associate brokers), and specifically in the [redacted] Florida area where the Petitioner operates her company. In the Petitioner's motion filing, she offered evidence relating to this aspect showing that managing real estate brokers in Florida earn an average salary of $156,498. She also offered evidence from other sources presenting average or median compensation in the United States in general.

We note the salary.com website contained a tool for the Petitioner to specify a city in Florida, which could have increased the average salary data, but she did not make that selection when printing out the evidence. We reiterate that the ambiguity the Petitioner introduced in the record of what amount her compensation was, weighs against her here too. As it appears her after-expense compensation was $132,524 for the provided tax year, that is well below the average for managing real estate brokers, even when considering the entire state of Florida.

While salary surveys for the state where the Petitioner works are relevant, a more accurate comparison would be in the specific area where she operates, especially when that area is known to have significantly

[1] Because the Petitioner only offered a partial two-page tax return, the record does not inform us what fell under line 19 "Other deductions" because the foreign national did not provide the full tax return with the required attached statement. This serves to further cloud whether any portion of those funds resulted in a salary or remuneration for the Petitioner.

elevated property values compared to other parts of the state. We note the USCIS Policy Manual informs petitioners that specific geographic evidence, or material pertinent to the applicable work location, could be considered to be more relevant than other types of evidence. *See generally* 6 *USCIS Policy Manual*, *supra*, F.2(B)(1).

Also, surveys detailing salaries at the upper end of an occupation are more valuable than those showing only average, median, or mean wages. Proving a salary is "above average" typically doesn't suffice to establish "a high salary or other significantly high remuneration." More comprehensive wage data is needed to effectively demonstrate eligibility under this criterion.

Not only has the Petitioner failed to identify an error in the Director's decision on her motions, but she also did not orient the appeal brief to address that decision. The failure to do so means her appeal does not overcome the most recent decision from the Director. It also means this appeal warrants a summary dismissal according to the regulation at 8 C.F.R. § 103.3(a)(1)(v), and it was unnecessary that we provide the above analysis under the salary or remuneration criterion.

Further, because the most recent decision was related to the motions and not to the petition filing, when the Petitioner did not contest any issue within the Director's motion decision, she abandoned her claims relating to those issues. *E.g.*, *Matter Khan*, 28 I&N Dec. 850, 852 n.4 (BIA 2024) (finding a topic is waived that was an issue before the lower adjudicative body but the filing party does not raise it on appeal); *see also Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 n.6 (11th Cir. June 17, 2019). We make this notation to inform the Petitioner that an attempt to file a motion on this appellate decision *to address the Director's motion dismissal* will not likely be considered, as those topics are waived throughout any proceeding based on this particular petition.

ORDER: The appeal is dismissed.